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FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation	)	RM-8355
of Foreign-affiliated Entities	)	RM-8392

To: The Commission

COMMENTS OF FOX TELEVISION STATIONS INC.

Fox Television Stations Inc. ("FTS") hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 95-53 (released Feb. 17, 1995) ("NPRM"), in the above-captioned proceeding.

I. INTRODUCTION

FTS previously has made various submissions to the Commission addressing the proper application of Section 310(b)(4) to indirect foreign investment in broadcast licensees. 1/ FTS will not repeat its arguments here; instead, these comments briefly summarize FTS' previous submissions, which are hereby incorporated by reference.

In addition, for the reasons stated below, FTS believes that, although an "effective market access" standard may serve the Commission's policy objectives

1/ These submissions include FTS' "Response to Supplement to Petition to Deny," filed December 2, 1993 (File No. BTCCT-930818KE); and Comments, filed February 27, 1995, and Reply Comments, filed March 9, 1995 (File No. BRCT-940201KZ).

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with respect to the provision of international telecommunications services and facilities, it may be counterproductive in the broadcast context. Accordingly, FTS believes that an "effective market access" test should not be incorporated among the public interest criteria utilized by the Commission with respect to its consideration of indirect foreign ownership of broadcast licensees under Section 310(b)(4). To the extent such a test is adopted, it should not be permitted to outweigh the other public interest factors relevant to the Commission's analysis.

II. SECTION 310(b)(4) DOES NOT OPERATE AS A BAR TO INDIRECT FOREIGN INVESTMENT IN BROADCAST LICENSEES.

The plain language and legislative history of Section 310(b)(4), and the case law interpreting the statute, demonstrate two essential facts: first, that Section 310(b)(4) was designed to prevent alien control of broadcast outlets; and, second, that whether or not to prohibit indirect foreign interests in broadcast licensees exceeding 25 percent is a matter committed by Congress to the discretion of the Commission.

Congress' unambiguous intent in promulgating Section 310(b)(4) was to prevent foreign control of domestic communications facilities and thereby to protect U.S. national security interests. 2/ The legislative history of Section

2/ The legislative history of Section 310(b) and antecedent provisions in the 1912 Radio Act and the 1927 Radio Act reveals a consistent purpose: safeguarding this country's broadcast media against alien control in time of war. Both Section 2 of the 1912 Radio Act and its successor, Section 12 of the 1927 Radio Act, sought to ensure that licenses would be controlled by domestic individuals and entities in the event of war. See Act of Aug. 13, 1912, ch. 287, Sec. 2, 37 Stat. 302 (1912); 68 Cong. Rec. 3037 (1927) (statement of Sen. Wheeler).

310(b)(4) demonstrates that the provision was intended to serve this goal by giving the Commission discretion to determine, on a case-by-case basis, whether indirect foreign investment exceeding the statutory benchmark will have an adverse impact on the public interest. See Conf. Rep., 73d Cong., 2d Sess. 23 (1934).

Indeed, Section 310(b)(4) by its terms contains no prohibition or limitation on foreign ownership in an entity that controls a broadcast licensee. Rather, Congress intended to permit indirect foreign ownership in broadcast licensees in excess of 25 percent unless and until the Commission has found that such ownership would disserve the public interest. 3/ See NPRM at ¶¶ 93 ("[u]nder the plain language of the Communications Act and its legislative history, the Commission has broad discretion in applying Section 310(b)(4)"), 102 (Commission conducts "case-by-case review" under Section 310(b)(4)). Unlike Section 310(b)(3), which does impose an absolute limit on foreign ownership in the licensee entity itself, Section 310(b)(4) does not set *any* foreign ownership limit in a corporation that controls a licensee. Furthermore, by its express terms, Section 310(b)(4) does not require investigation or prior clearance by the Commission of foreign ownership exceeding 25 percent. Rather, the section gives the Commission discretion to restrict foreign ownership only where it has affirmatively determined, in light of the section's statutory intent, that public interest considerations warrant

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3/ Section 310(b)(4) provides that a broadcast license shall not be granted to, or held by, an entity controlled by a corporation more than 25 percent of whose capital stock is owned of record or voted by aliens only "if the Commission finds that the public interest will be served by the refusal or revocation of such license." 47 U.S.C. § 310(b)(4).

such action. See FTS' December 2, 1993 Response at 4-6; FTS' February 27, 1995 Comments at 14-17 and Appendix B at 6.

Judicial interpretation of Section 310(b)(4) has recognized and emphasized this rationale for the structure of the foreign ownership provision. The United States Court of Appeals for the District of Columbia Circuit has stated that Section 310(b)(4) "was designed . . . to 'prevent[ ] alien activities against the Government during the time of war.' " Coalition for the Preservation of Hispanic Broadcasting v. FCC, 931 F.2d 73, 79 (D.C. Cir.) (quoting Noe v. FCC, 260 F.2d 739, 741 (D.C. Cir. 1958) (quoting 68 Cong. Rec. 3037 (1927) (remarks of Sen. Wheeler))), cert. denied, 112 S. Ct. 298 (1991). In Noe v. FCC, in turn, the Court of Appeals saw no threat to the national security in the Commission's grant of a television broadcast license to Loyola University, a New Orleans educational institution connected with the Society of Jesus (an order of predominantly non-U.S. Roman Catholic priests), because Section 310(b)(4) "was incorporated in the Communications Act to 'guard against alien control and not the mere possibility of alien control.' " 260 F.2d at 742 (citing S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934)). In the absence of a Commission finding that Loyola's ownership would be contrary to the public interest, the Court of Appeals upheld the grant. The Noe opinion confirms that Section 310(b)(4) addresses foreign control of broadcasting and allows indirect foreign ownership in broadcast licenses to exceed the 25 percent benchmark unless the Commission has found that such ownership would disserve the public interest. See FTS' February 27, 1995 Comments at 11-14.

III. THE COMMISSION'S DESIRE TO ENSURE ACCESS TO FOREIGN MARKETS SHOULD NOT OUTWEIGH CONGRESS' FUNDAMENTAL CONCERN IN PROMULGATING SECTION 310(b)(4) – TO PREVENT FOREIGN CONTROL OF U.S. BROADCAST STATIONS.

FTS agrees that application of an "effective market access" standard may be prudent with respect to investments in corporations providing international telecommunications services or facilities, which by definition entail competition on a global scale. See NPRM at ¶ 28. Indeed, as the Commission notes, "[t]he focus of telecommunications service providers has become increasingly global over the last several years," in large part because their customers increasingly demand "an 'end-to-end' package of services, including domestic (in two or more countries) and traditional international services." Id. at ¶ 20. As a result of these trends in consumer demand, U.S. common carriers are facing increasing pressure to enter foreign markets.

However, FTS believes the Commission's stated objectives in adopting an "effective market access" approach with respect to Section 214 International Authorizations, see NPRM at ¶ 26, are not readily transferable to its analysis under Section 310(b)(4) with respect to broadcast licensees. Indeed, application of a reciprocity standard in the broadcast context could have the unintended effect of undermining the objective of Section 310(b)(4). Substituting such a test for the Commission's broader public interest analysis in the broadcast context -- or even weighting the analysis toward this factor -- would be inconsistent with the statute's underlying purpose to prevent foreign control. At the same time it would ignore the potentially significant benefits of permitting indirect foreign investment in broadcast licensees in excess of the Section 310(b)(4) benchmark.

Thus -- assuming the underlying statutory purpose of preventing foreign control is satisfied -- factors such as, for example, increased availability of investment capital for existing broadcast licensees; increased access to capital for potential new entrants, especially minorities; 4/ and increased local and national competition, would appear to be far more relevant to the Commission's public interest determination under Section 310(b)(4) than the accessibility of foreign markets to U.S. broadcasters.

Simply stated, allowing these benefits, and others, of indirect foreign investment in excess of the 25 percent benchmark would be entirely consistent with the language and purpose of Section 310(b)(4) *wherever the stations in question are controlled by U.S. citizens.* Indeed, the issue of reciprocity is completely irrelevant to the clear statutory purpose, and the Commission's "traditionally heightened concern," of guarding against foreign control of broadcast licensees. See, e.g., NPRM at ¶¶ 92, 99.

4/ The Commission has recognized that "lack of access to capital [is] the largest obstacle to minority ownership . . . ." Statement of William E. Kennard, General Counsel, Federal Communications Commission, Before the Senate Committee on Finance, March 7, 1995 at 4. In this connection, as discussed in greater detail in FTS' March 9, 1995 Reply Comments (at 69-70), FTS has proposed that, in applying Section 310(b)(4), the Commission establish a presumption in favor of indirect foreign investment in excess of 25 percent where the subject broadcast stations are controlled by minorities.

If the Commission decides to include "effective market access" among the factors it considers in Section 310(b)(4) public interest determinations in the broadcast context, it should not place unwarranted emphasis on measuring access to foreign broadcast markets by U.S. investors. Narrowing the public interest analysis under Section 310(b)(4) to an assessment of "effective market access" would ignore essential benefits and would obscure the basic purpose behind the statutory regime.

IV. CONCLUSION

FTS agrees that, because of the issue of content control, "disparate treatment" of investments in international telecommunications services and facilities, on the one hand, and investments in domestic broadcast outlets, on the other, may be appropriate. See NPRM at ¶ 100. But there is no justification for construing "disparate" as "more restrictive."

Accordingly, for the reasons stated above, FTS believes the Commission should not adopt an "effective market access" test in connection with its public interest analysis under Section 310(b)(4). Unlike the telecommunications market segment, the broadcast segment is not readily susceptible to the international trade objectives underlying the Commission's "effective market access" proposal. The statutory purpose of Section 310(b)(4) is served, and its requirements are satisfied, when licensees that benefit from indirect foreign investment in excess of the 25 percent benchmark are under U.S. control.

Respectfully submitted,

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April 11, 1995

<u>CERTIFICATE OF SERVICE</u>

I, Lesha Cruey, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 11th day of April, 1995, a copy of the foregoing Comments of Fox Television Stations Inc. was delivered by hand to the following:

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